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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 114

MANUEL VACA, ET AL., PETITIONERS

v.

NILES SIPES, ADMINISTRATOR OF THE ESTATE OF BENJAMIN OWENS, JR., DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of June 6, 1966 (384 U.S. 969), inviting the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The order of the Circuit Court of Jackson County, Missouri, granting a motion to set aside the verdict (R. 171) is unreported. The opinion of the Kansas City Court of Appeals (R. 193–201) is reported at 59 LRRM 2165. The opinion of the Supreme Court of Missouri (R. 205–218) is reported at 397 S.W. 2d 658.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on December 13, 1965 (R. 204). A timely petition for rehearing was denied on January 10, 1966 (R. 218). On April 7, 1966, Mr. Justice White extended the time for filing a petition for certiorari to and including May 2, 1966 (R. 219). The petition for certiorari was filed on April 29, 1966, and was granted on June 6, 1966 (R. 220; 384 U.S. 969). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

A union, which is the exclusive representative of the employees of an employer subject to the National Labor Relations Act, processed the grievance of a discharged employee through the first four steps of the contract grievance procedure, but declined to take the grievance to the final step, arbitration, because it believed that the grievance lacked merit. Alleging that the union had acted arbitrarily and unfairly in failing to press the grievance to arbitration, the employee sought and recovered compensatory and punitive damages in a State court action against union officials. The United States, as *amicus curiae,* will discuss the following questions:

1. Is the subject matter of the action within the exclusive primary jurisdiction of the National Labor Relations Board?

2. If the State court has jurisdiction, does federal law authorize an award of compensatory and punitive damages if there was any reasonable basis for the union's allegedly unfair conduct, absent proof of hostile motive or fraud?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A (pp. 30–31, *infra*).

STATEMENT

Owens (respondent's decedent)[1] was employed as a beef cutter (a job requiring him to lift heavy sides of beef) by Swift & Company under a collective bargaining agreement with the union (United Brotherhood of Packinghouse Workers) of which petitioners are officers. The contract provided for a five step grievance procedure. When Owens was discharged by Swift in January 1960, on the ground that he was not physically fit, Owens called upon the union to invoke that procedure (R. 23–25). Between January and November 1960, the union carried Owens' claim that he had been improperly discharged through the first four steps of the grievance procedure without obtaining reinstatement (R. 27–29, 50–55, 86–89, 104–106, 134–136). At these meetings, which involved persons of progressively higher authority in the management hierarchy (R. 174–176), the union urged that Owens was able to work and should be reemployed (R. 186, 188, 190). The union took that position in reliance on statements which Owens had obtained at the union's request from a number of doctors (R. 18, 28, 46). Swift, on the other hand, relied on other medical reports to the contrary (R. 104–105, 121–124, 135–

[1] Owens died while his appeal to the Kansas City Court of Appeals was pending; Sipes, the administrator of his estate, was substituted as appellant (R. 202).

136, 145, 186, 188). Before proceeding to the fifth step—arbitration—the union asked Owens to go to a doctor of his own choosing for a thorough examination at the union's expense (R. 56–57, 107, 116). Owens was then examined by Dr. Hughes W. Day, a heart specialist, who reported that Owens had "hypertensive heart disease" and that he was "not able to work" (R. 187). After receiving the report the union declined to press Owens' grievance to arbitration and subsequently abandoned the claim (R. 81, 106–109, 125–126, 138, 139). In February 1962, Owens commenced this action in the Circuit Court of Jackson County, Missouri, alleging that the union officers had declined to pursue his claim "arbitrarily, capriciously and without just or reasonable reason or cause" (R. 4). He sought $7,000 compensatory damages and $3,000 punitive damages.

The jury heard testimony that the union did not take Owens' grievance to arbitration because of Dr. Day's adverse report and the lack of sufficient favorable medical evidence, and that ultimately, in May 1964, the grievance was withdrawn because there were no new developments since Dr. Day's examination (R. 81, 106–107, 108–109, 138, 139). However, Owens testified that, when he asked Manuel Vaca, president of the Local, to take the grievance to arbitration, Vaca said the union would do so if Owens would give him $300 for the cost of arbitration (R. 29–30, 79–81, 154). Vaca, on the other hand, denied asking Owens for any money (R. 126). Owens also testified that, since his discharge, he had done various strenuous jobs and that he felt well (R. 31–36, 73–74).

The trial court, denying petitioners' motion for a directed verdict (R. 158), instructed the jury, *inter alia*, to find for Owens if Swift's assertion of Owens' physical inability to work was "false and wrongful in that it was not based on fact" (R. 160), and if petitioners "arbitrarily * * * and without just cause or excuse" refused to carry Owens' grievance to arbitration (R. 161). On the other hand, the jury was instructed to find for petitioners if they acted "reasonably and in good faith," or did not act "maliciously, arbitrarily, wantonly, or wrongfully" (R. 162). Finally, the court instructed that, if the jury found these issues for Owens, then he should be compensated "for any actual damages * * * by loss of work" caused by petitioners (R. 161); and, if they caused such actual damages by conduct that was "willful, wanton and malicious," the jury might award Owens "an additional amount as punitive damages, in such sums * * * [as] will * * * punish defendants and * * * deter them and others from like conduct" (R. 162). The jury returned a verdict for Owens, awarding him $7,000 actual, and $3,300 punitive, damages (R. 165).

The trial court granted petitioners' motion to set aside the verdict, on the ground that the conduct of the union was arguably protected by the National Labor Relations Act, and thus within the exclusive primary jurisdiction of the National Labor Relations Board (R. 171). The Kansas City Court of Appeals affirmed (R. 193–201).

The Supreme Court of Missouri reversed. It held that the cause was not preempted, for Owens was not

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complaining about discrimination in employment, but about an internal union matter, *i.e.*, "the refusal of the union to fully process his grievance"; accordingly, the State court had jurisdiction under *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 617 (R. 215–216). The Supreme Court of Missouri further held that, in light of the evidence that Owens had obtained reports from a number of doctors stating that he was able to work and his testimony that he had engaged in hard work subsequent to his discharge, the jury could reasonably find that petitioners had acted in bad faith in refusing to carry Owens' grievance to arbitration (R. 216–217).

ARGUMENT

INTRODUCTION AND SUMMARY

Respondent claims that the union violated its duty fairly to represent Owens when it declined to take his grievance against Swift to arbitration. The case raises the important question of the proper forum and the source of law for the adjudication of such claims. Neither the complaint nor the opinions of the State courts characterized the legal nature of the claim nor identified the source of the applicable legal standards. However, it seems apparent that the conduct complained of emerges from relationships created by and deeply enmeshed in federal law. Analysis appropriately begins with those relationships.

The union was the exclusive representative of Owens and his co-workers for purposes of collective bargaining with Swift by virtue of Section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)). The agreement between Swift and the union establishing

the grievance procedure resulted from the performance by each of their duty to engage in collective bargaining, imposed by Sections 8(a)(5) and 8(b)(3) of the Act. It effectuated the employees' right "to bargain collectively through representatives of their own choosing" guaranteed by Section 7 of the Act and the federal policy "to promote industrial stabilization through the collective bargaining agreement." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578. Moreover, the grievance procedure thus adopted is itself "a part of the continuous collective bargaining process"; indeed, "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *Id.* at 581.

The processing of grievances is commonly one of the principal functions of a union. Through the grievance machinery the inevitable gaps in the collective bargaining agreement are filled in, precedents are developed and the "common law of the plant" is created. The union's handling of a grievance is plainly fraught with significance not only for the aggrieved employee but also for all the other employees in the bargaining unit, the union itself, the employer, and thus for the health of industrial self-government and the industrial stability which Congress sought to foster.[2] Moreover, it has been widely recognized that the utility of the grievance procedure depends very

[2] See Cox, *Rights under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955). See, also, *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782 (D. Md.), affirmed, 273 F. 2d 614 (C.A. 4), certiorari denied, 363 U.S. 849.

largely on the ability and willingness of the union "to sift out and reject, through investigation and the grievance machinery steps preliminary to arbitration, those employee complaints which lack substance."[3] If the machinery is to work, unions must be free, as this Court has recognized, "to sift out wholly frivolous grievances which would only clog the grievance process" and "to take a position on the not so frivolous disputes." *Humphrey* v. *Moore,* 375 U.S. 335, 349.

Important as the union's exercise of judgment and discretion is in the processing of grievances, such discretion cannot be permitted to cloak arbitrary decisions that run roughshod over the rights and legitimate interests of the employees for whom the union is the statutory bargaining agent. This Court has held that "[t]he undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Id.* at 342; *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337–338. Moreover, the Court has recognized that the duty of fair representation, and the corresponding right to be fairly represented, derive from the National Labor Relations Act in light of the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in

[3] Wyle, *Labor Arbitration and the Concept of Exclusive Representation,* 7 Boston Coll. Ind. & Com. L. Rev. 783, 789, (1966). See, also, Ross, *Distressed Grievance Procedures and their Rehabilitation,* National Academy of Arbitrators, Proceedings, 16th Annual Meeting, 104, 107 (1963). See also note 2, *supra.*

their interest and behalf * * *" (*Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 202). *Syres* v. *Oil Workers Union*, 350 U.S. 892, reversing 223 F. 2d 739 (C.A. 5); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Wallace* v. *Labor Board*, 323 U.S. 248, 255; Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957). Cf. *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768.

The scope of the duty of fair representation imposed by the Act is measured by federal standards which inevitably reflect the competing duties also imposed by the Act. The union established as the exclusive bargaining agent under Section 9(a) is an agent bound to serve numerous principals. "Conflict between employees represented by the same union is a recurring fact." *Humphrey* v. *Moore*, 375 U.S. at 349–350. "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. at 338. If collective bargaining is to function at all, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ibid.* Accordingly, the Court has declined to find a breach of the union's duty of fair representation unless there is "substantial evidence of fraud, deceitful action or dishonest conduct," or other evidence that the union's position, though "contrary to that of some individuals whom it represents," is not taken in good faith. *Humphrey* v. *Moore*, 375 U.S. at 348–349. Whatever the

precise configuration of the union's duty, the important principle is that it cannot be ascertained without reference to the complex of legal and practical factors at work in the collective bargaining process under federal law.

Since the breach of an obligation imposed by the National Labor Relations Act generally constitutes an unfair labor practice (under Section 8) which the Labor Board is empowered to remedy (under Section 10), the Board, building on the reasoning of *Steele*, and *Wallace, supra*, has held that a violation of the duty of fair representation constitutes an unfair labor practice which the Board has jurisdiction to remedy. In a series of recent cases beginning with *Miranda Fuel Co.*, 140 NLRB 181 (1962)[4] the Board has ruled that the employee's right "to bargain collectively through [his] representatives," guaranteed

[4]The other cases are: *Independent Metal Workers Union, Local No. 1* (*Hughes Tool Co.*), 147 NLRB 1573; *Local 1367, ILA* (*Galveston Maritime Association*), 148 NLRB 897; *Local 12, United Rubber Workers* (*The Business League of Gadsden*), 150 NLRB 312; *Cargo Handlers, Inc.*, 159 NLRB No. 17. The *Galveston* and *Gadsden* cases are presently pending before the Court of Appeals for the Fifth Circuit, on petitions for enforcement and review of the Board's orders. The Board's decision in *Miranda* was denied enforcement by the Court of Appeals for the Second Circuit (Judge Friendly dissenting), but only one judge found it necessary to reach the fair representation issue. *National Labor Relations Board* v. *Miranda Fuel Co.*, 326 F. 2d 172 (C.A. 2). Similarly, this Court has thus far refrained from deciding whether breach of the duty of fair representation is an unfair labor practice. See *Republic Steel Co.* v. *Maddox*, 379 U.S. 650, 652; *Humphrey* v. *Moore*, 375 U.S. 335, 344; *Local 100, United Assn. of Journeymen & Apprentices* v. *Borden*, 373 U.S. 690, 696, n. 7.

by Section 7, necessarily embraces the union's duty of fair representation derived from Section 9(a). That is to say, unless employees are "free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," their Section 7 right is materially impaired. *Miranda Fuel Co.*, 140 NLRB 181, 185. Accordingly, a union that arbitrarily refuses to process grievances for employees, or otherwise fails fairly to represent them in collective bargaining, restrains such employees in the exercise of their Section 7 right to be fairly represented. Such action, therefore, violates Section 8(b)(1)(A), which makes it an unfair labor practice for a labor organization to "restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7."

Further, in cases following *Miranda* the Board has also held that a union that unfairly represents an employee violates its duty to bargain collectively imposed by Sections 8(b)(3) and 8(d) of the Act.[8] Section 8(b)(3), read in conjunction with Section 8(d), imposes a duty on the statutory representative which runs not only to the employer, but to the employees in the unit as well, and that duty contemplates

[8] Section 8(b)(3) provides that "[i]t shall be an unfair labor practice for a labor organization or its agents * * * to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. * * *"

that the union will bargain lawfully with the employer.[*] As the Board stated in *Local 1367, ILA (Galveston Maritime Association)*, 148 NLRB 897, 899: "Section 8(d) speaks, *inter alia*, of a mutual obligation of employers and unions 'to confer in good faith' and to sign 'any agreement reached.' These quoted phrases contemplate * * * only lawful bargaining and agreements, for the statute does not sanction the execution of agreements which are unlawful." Since Sections 7 and 9 of the Act impose a duty of fair representation, a union has not engaged in lawful bargaining where, either through entry into an agreement or its administration, it violates that duty. See *Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.), 147 NLRB* 1573, 1577, 1604; *Local 12, United Rubber Workers (Business League of Gadsden)*, 150 NLRB 312. See, also, Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 172–174 (1957). In thus affording sanctions for breach of the duty of fair representation, the Board's *Miranda* doctrine effectuates the purpose and policy of the Labor Management Relations Act not only "to promote the full flow of commerce," but also "to protect the rights of individual employees in their relations with labor organizations" (29 U.S.C. 141 (b)).

From the foregoing it is evident that Owens' cause of action (1) is predicated on conduct proscribed by federal labor law, (2) is necessarily measured by fed-

[*] The processing of grievances is part of the bargaining function. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581; *Conley v. Gibson*, 355 US 41, 46.

eral standards derived from a complex of countervailing policies, and (3) is potentially enforceable before the National Labor Relations Board. Because Owens' claim is directed precisely to the conduct of the union's role in the collective bargaining process, we think that these factors demonstrate that it falls within the area that Congress has subjected to comprehensive regulation and which is therefore wholly preempted by federal law. These considerations also suggest that the prospect of variant judicial interpretations of the duty of fair representation is likely to have a serious inhibitory effect on the proper functioning of unions as statutory bargaining agents and, therefore, a high potential for conflict with national labor policy. The realization that every compromise negotiated and every claim relinquished by a union in the collective bargaining process is potentially subject to scrutiny for unfairness by a judge and jury inexperienced in the realities of industrial relations hardly seems conducive to responsible union representation. Unless such scrutiny is informed by an extensive familiarity with the nature of the bargaining process and the legitimate objectives of the union, prudence may well dictate that every grievance be pressed to arbitration. We think that these considerations "point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency." *Local 100, United Assn. of Journeymen & Apprentices* v. *Borden*, 373 U.S. 690, 695–696.

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We show below that these conclusions, predicated on the practicalities of the problems involved, are supported by the prior decisions of this Court effectuating national labor policy in the context of our federal system. We first urge that under the rule announced in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, exclusive jurisdiction to regulate the conduct complained of has been preempted by the Board. In light of *Garmon* and subsequent decisions, we show that the State court is precluded from entertaining this action because it entails the regulation of conduct (1) that is arguably protected or prohibited under the National Labor Relations Act, (2) that is of more than peripheral concern to federal labor law, (3) that does not touch interests deeply rooted in local feeling and responsibility, and (4) that does not constitute a breach of a collective bargaining contract. Alternatively, we urge that, if the State court had jurisdiction, the judgment is inconsistent with governing federal standards enunciated in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, and *Humphrey* v. *Moore*, 375 U.S. 335. We contend that under those standards, which recognize that a wide range of reasonableness must be allowed the exercise of union discretion in the collective bargain process, absent affirmative evidence of hostile motive or fraudulent or deceitful conduct, liability may not be imposed where, as here, there is reasonable basis for the union's allegedly unfair conduct.

I.

SINCE THE CONDUCT ALLEGED IN THE COMPLAINT WOULD ARGUABLY CONSTITUTE AN UNFAIR LABOR PRACTICE AND DID NOT ENTAIL A BREACH OF A COLLECTIVE BARGAINING CONTRACT, THE *GARMON* RULE (359 U.S. 236) PRECLUDED THE STATE COURT FROM ENTERTAINING THE ACTION

As we have shown (*supra*, p. 4), the complaint alleged in substance that the union had unfairly represented Owens by refusing, for arbitrary and malicious reasons, to carry his grievance to arbitration. Such conduct, if proved, would constitute not only a breach of the union's duty of fair representation under the National Labor Relations Act, but also an unfair labor practice under Section 8 of the Act (*supra*, pp. 10–12).[1] On the other hand, if it were found that the union had in fact acted reasonably in refusing to proceed to arbitration, its conduct would fall within the protection of Section 7 of the Act (see *supra*, pp. 9, 12 n. 6). In these circumstances, the exclusive pri-

[1] Respondent states (Br. in Opp., p. 7; see pp. 4–5) that the Board declined to take jurisdiction of Owens' claim against the union. He bases this statement on a letter from one of the Board's regional offices to counsel for Owens (and for respondent), a portion of which is set forth in the opinion of the Kansas City Court of Appeals (R. 195–196). We annex the entire letter as Appendix B hereto (pp. 32–33, *infra*). The letter does not support respondent's assertion that the Board declined to take jurisdiction of the claim which is the basis of the present action; indeed it has no relevance to the claim that the union violated any duty in failing to press his grievance to arbitration. The letter is dated September 16, 1960—two months before the fourth step meeting was held (see R. 110–111; 185; 189–190) and, therefore, long before the question of proceeding to the fifth step arose.

mary jurisdiction of the Labor Board is confirmed by *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. The Court there held (at 245):

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

The considerations which underlie the *Garmon* preemption doctrine are fully applicable here. As the Court explained in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490–491: "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible and conflicting adjudications as are different rules of substantive law. * * *" So here, State court application of the highly generalized federal standard of fair representation leaves very substantial room for divergent application and affords no promise of a consistent and harmonious development. Therefore, absent a requirement that such cases be presented to the Board in the first instance, there is a real danger that "a variety of local procedures and attitudes * * * [would] produce incompatible and conflicting adjudications." *Garner*, *supra*.

Since at very least "it is reasonably 'arguable' that the matter comes within the Board's jurisdiction" (*Borden, supra,* at 696), the *Garmon* principle is applicable unless the present case falls within one of the exceptions which *Garmon* recognized were imposed by a "due regard for the presuppositions of our embracing federal system" (359 U.S. at 243). Thus the Court has declined to find preemption applicable (1) "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act" and (2) "where the regulated conduct touched interests * * * deeply rooted in local feeling and responsibility" (*id.* at 243–244).

As to the first exception, a union's engagement in, or refusal to engage in, collective bargaining on behalf of an employee is clearly at the very core of the system of rights and duties created by the Labor Managment Relations Act. Such conduct can, therefore, hardly be regarded as of "merely peripheral concern." In this respect the present case is quite unlike the suit for the restoration of union membership involved in *International Assn. of Machinists* v. *Gonzales,* 356 U.S. 617, which was cited in *Garmon* (at 243) as illustrative of a matter of only peripheral concern, and upon which the Supreme Court of Missouri relied in the present case. In *Gonzales* it was recognized that, in view of the refusal of Congress to regulate "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein" (Section 8(b)(1)(A) proviso), State law was free to regulate such rights and that "the comprehensive relief of equity" might

"fill out" a reinstatement order by an award of damages for loss of wages and suffering (356 U.S. at 620-621). The decision in *Gonzales*, therefore, "turned on the Court's conclusion that the lawsuit was focused on purely internal union matters * * * and that the principal relief sought was restoration of union membership rights." *Local 100, United Assn. of Journeymen & Apprentices* v. *Borden*, 373 U.S. at 697. Here, on the other hand, respondent's claim is addressed to the manner in which the union participates in collective bargaining with the employer. The inevitable effect of the decision below is to regulate such participation.

Nor is respondent's claim addressed to conduct touching interests "deeply rooted in local feeling and responsibility"—the second exception recognized in *Garmon* (359 U.S. at 243). That category was held to embrace "conduct marked by violence and imminent threats to the public order" (359 U.S. at 247; see also, *id.* at 248, n. 6). It also includes the verbal violence entailed in malicious defamation. *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 62.* The union's

*In *Linn*, although the Board could offer no remedy at all for the injury to reputation caused by libel, the Court was careful to minimize the possibility of interference with effective administration of national labor policy. It therefore limited the availability of State remedies "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U.S. 53, 64-65. Here, unlike *Linn*, the Board can redress the injury done to the individual. See, e.g., *Local 12, United Rubber Workers (The Business League of Gadsden)*, *supra*, 150 NLRB at 322, 323 (union ordered to process to arbitration claims of unfairly treated grievants); *Miranda Fuel Co., Inc.*, *supra*, 140 NLRB at 186, and 125 NLRB 454, 455 (ordering restoration

refusal to insist on the arbitration of Owens' grievance, however that conduct may be described, plainly does not have the characteristics of this category. Far from having deep local roots, the interests here affected are almost wholly the creation of federal law.

Finally, in his brief in opposition (pp. 1, 5), respondent for the first time seeks to present his case as one for the union's breach of a collective bargaining contract and therefore within the concurrent jurisdiction of the State court recognized by Section 301 of the Labor Management Relations Act (29 U.S.C. 185). See *Smith* v. *Evening News Assn.*, 371 U.S. 195. This claim has no support in the record. Neither the complaint (R. 1–6) nor any of the opinions below (R. 193–201; 203; 205–218) in any way suggests that the action is for breach of contract.* The omission is not fortuitous. So far as appears, nothing in

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of job rights and back pay where employer was guilty of "acceding to union's" unfair treatment). The fact that the State may be able to provide more extensive relief than the Board, *e.g.*, punitive damages, does not militate against preemption. See *Borden*, *supra* (reversing State court award of damages for loss of both past and prospective earnings). Indeed, where, as here, the conduct is subject to regulation by the Board as an unfair labor practice, the conflict inherent in the provision of State law remedies unavailable to the Board strongly supports the argument for preemption. See *Garmon*, *supra* at 246–247.

*Although the complaint alleged (R. 3) that Swift discharged Owens in violation of the seniority and discharge for cause provisions of the contract, the suit is not against Swift but only against the union. A separate action against Swift is pending in the State court (Pet. 17). Moreover, it is not suggested that the union's alleged violation of its duty of fair representation caused Swift to violate the contract. Owens testified (R. 40) and the court below found (R. 215) that the union had nothing to do with Owens' discharge (see *infra*, pp. 26–27).

the collective bargaining contract between the union and Swift (R. 173–178) imposes upon the union any duty to take grievances to arbitration—the duty that the union is alleged to have violated. On the contrary, the grievance procedure set forth in the contract (R. 174–176) provides that "[i]f not settled in the fourth step, then the National Union *may* refer the grievance to Gabriel N. Alexander as Arbitrator" (R. 176; emphasis added). The duty of fair representation derives from federal labor law and governs the collective bargaining process (see pp. 8–12, *supra*). In respondent's contention that the duty is imposed by the collective bargaining contract lurks the implausible assumption that the duty can be waived by the contracting parties. While the contract can undoubtedly reaffirm the duty of fair representation imposed by law, it cannot successfully disaffirm it. In any event, the present contract did neither.

The absence of any basis for a claim for breach of the collective bargaining contract is more than a technical flaw in respondent's argument for concurrent jurisdiction. In *Smith, supra*, the Court held that the *Garmon* rule was inapplicable to a suit by an employee against his employer for breach of a contract clause prohibiting discrimination against employees on account of union activity, even though the employer's conduct also constituted an unfair labor practice within the jurisdiction of the Labor Board. We there urged, as *amicus curiae*, that the jurisdiction of the State court be upheld in light of the

> * * * fundamental differences between the collective bargaining agreement, on the one hand,

> and State statutes and tort law on the other, as sources of enforceable rights and obligations. The latter are rules devised by government and imposed coercively upon the parties from without. By contrast, the standards of conduct prescribed by the collective bargaining agreement are self-imposed and are shaped to the particular needs and circumstances of the enterprise whose industrial life they govern. Because these obligations are voluntarily assumed, their enforcement by tribunals other than the Board does not entail the same danger of upsetting the federal statutory balance between the interests of labor and management that is present when another government body attempts to impose restraints which were not bargained for. * * * [*Smith* v. *Evening News Assn.*, No. 13, Oct. Term 1962, Brief for the United States as *Amicus Curiae*, pp. 13–14.]

Here, too, were there a contractual standard in the formulation of which the union had participated and to which the union had assented, there could be no sound objection to the State court's assertion of jurisdiction. It is precisely the absence of such a standard, generated by those most familiar with the needs and circumstances of the affected plant or industry, that makes the invocation of the Labor Board's expertise most appropriate and enhances the danger of conflict between court-created rules and national labor policy. Accordingly, there is no inconsistency between our position here and the Court's decision in *Smith* v. *Evening News Assn.*[10]

[10] Likewise there is no inconsistency with the jurisdiction established under the Civil Rights Act of 1964 (78 Stat.

The situation here is also distinguishable from that in *Humphrey* v. *Moore*, 375 U.S. 335. There, the Court (by a closely divided vote) held that a State court had jurisdiction under Section 301 of an employee's suit against both the employer and the union to enjoin implementation of an agreement for dovetailing seniority which was allegedly violative of the collective bargaining agreement and the result of dishonest union action. In that case there was some basis for concluding that the union's alleged breach of its duty of fair representation had caused the alleged contract violation by the employer.[11] Here, on the other hand, the union's alleged unfair action did not cause, but occurred *after*, the alleged contract breach by Swift (see *supra*, pp. 3, 19 n. 9). Accordingly, this

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241, 253, Sec. 701 *et seq.*). Section 703(c) of that Act (42 U.S.C. 2000e-2(c)) makes it "an unlawful employment practice" for a labor organization to discriminate against any individual because of his race, color, religion, sex, or national origin. Section 706(f) (42 U.S.C. 2000e-5(f)) gives the United States district courts jurisdiction of private suits for injunctive and other relief against such practices. Since there is no legitimate union interest in such discriminatory practices and Congress has flatly prohibited them, there is little likelihood that judicial determinations will conflict with national labor policy.

[11] The employer acted pursuant to the decision of the joint employer-union grievance committee established under the collective agreement. As the Court pointed out (375 U.S. at 343): "No fraud is charged against the employer; but except for the improper action of the union, which is said to have dominated and brought about the decision, it is alleged that Dealers [the employer] would have agreed to retain its own employees. The fair inference from the complaint is that the employer considered the dispute a matter for the union to decide. * * *"

case, unlike *Humphrey*, cannot reasonably be viewed as one to enforce the collective bargaining agreement, but only as one to enforce the union's duty of fair representation imposed by the National Labor Relations Act.

II

ASSUMING THAT THE STATE COURT HAD JURISDICTION TO ENFORCE THE UNION'S DUTY OF FAIR REPRESENTATION, THE JUDGMENT IS NOT CONSISTENT WITH THE GOVERNING FEDERAL STANDARDS

We have urged (*supra*, pp. 8–12) that the duty of fair representation is one derived from the federal regulatory scheme as a corollary of the union's statutory status as exclusive bargaining agent. We have also urged (*supra*, pp. 15–21) that, because the duty is intimately entwined with the union's other obligations and powers under the National Labor Relations Act, State or federal court enforcement of the duty creates a risk of inhibiting unions in the exercise of their statutory responsibilities, and thus of conflict with national labor policy, sufficiently serious to require the invocation of the Board's exclusive primary jurisdiction under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. Even if we are mistaken, however, in thus concluding that initial competence to adjudicate claimed violations of the duty of fair representation is properly confined to the Labor Board, we nevertheless urge that, in whatever forum they are heard, such claims are to be decided by reference to federal law and that under federal law the judgment below cannot stand.

If, as respondent now contends (see *supra*, p. 19), Owens' claim was predicated on a breach of the collective bargaining agreement, the proposition that such claim is governed by federal law is too firmly established to require discussion. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448; *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650. If, as seems more likely, the claim is not contractual in nature, it is equally true that doctrines of local law must give way to the extent that they fail to comport with principles of federal labor law. *Local 20, Teamsters* v. *Morton*, 377 U.S. 252; *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283. Thus, even where it is recognized that State courts have a deeply rooted interest in providing redress for tortious conduct, such remedies may be confined within limits established by federal law so as to forestall the inhibition of federally protected conduct and avert conflict with national labor policy. *Linn* v. *Plant Guard Workers*, 383 U.S. 53.

The governing federal standards have been discussed above (*supra*, pp. 8–10). They reflect an attempt to strike a vital balance between the union's continuing obligation to protect the interests, both long-term and short, of all the workers in the bargaining unit and its duty fairly to represent the claims of individuals which are not always harmonious with those of the group. Thus, while the union is "charged with the responsibility of representing [all employees] fairly and impartially" (*Wallace Corp.* v. *National Relations Board*, 323 U.S. 248, 255), it nonetheless has, of necessity, "discretion to make such concessions

and accept such advantages as, in the light of all relevant considerations [it] believe[s] will best serve the interests of the parties represented" (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337–338). The cardinal consideration, then, is that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Id.* at 338; *Humphrey* v. *Moore*, 375 U.S. 335, 349. A State court judgment, though prompted by a salutary concern to protect the rights of the individual, conflicts with federal law insofar as it fails to give effect to that standard. Vested by Congress with a broad discretion in its conduct of industrial self-government, the activities of the statutory bargaining agent should not be constrained by more restrictive State judicial standards.

It is apparent from the opinion of the court below (R. 216–217) that, in considering petitioners' contention that the evidence produced at trial was insufficient to show a violation of the union's duty fairly to represent Owens, the court failed to weigh, or even allude to, the applicable federal standard. Accordingly, we believe that it would be appropriate for this Court to remand the case for further consideration of the record in light of that standard. However, we also believe that the inadequacy of the Owens' evidence was so marked as to warrant the Court's independent determination that the verdict cannot stand. See *Humphrey* v. *Moore*, 375 U.S. at 348–349.

Viewing the evidence in the light most favorable to

the plaintiff (R. 216), the court below noted (1) that "three physicians certified that plaintiff was able to perform his regular work"; (2) that three other physicians certified that "his blood pressure was not dangerously high"; and (3) that Owens had testified that he had done hard physical labor following his discharge (R. 217). This, the court held, was sufficient to warrant a finding that the union had acted arbitrarily and without just cause or excuse in declining to take Owens' grievance to arbitration.[12] On the other hand, there was also evidence that two doctors, whose qualifications were not challenged, had advised that Owens was unfit for work by reason of his congenital heart condition (R. 21, 73, 90, 187–188). Furthermore, there was no evidence, nor was it even contended, that the union acted or failed to act because of any hostility to Owens. As the court below noted (R. 215):

> * * * Here the union had nothing to do with Owens being discharged. It is evident that the

[12] In reaching this conclusion the court below did not refer to the conflicting testimony (*supra*, p. 4) respecting an alleged demand by petitioner Vaca, president of the local, that Owens pay $300 as a prerequisite to agreement by the union to take his grievance to arbitration. The court appears to have been correct in its apparent assumption that, under the facts presented, this issue was irrelevant to the question of the union's fairness. Owens himself believed that Vaca wanted the money to pay for the arbitration, not as a personal reward (R. 80–81). Moreover, as a matter of law the union may well have been justified in requiring, if it did so, that Owens pay for or contribute to the cost of arbitration. Cf. *Donnelly* v. *United Fruit Co.*, 190 A. 2d 830, 842 (N.J. Sup. Ct.); *Summers, Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 403–404 (1962).

> idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. * * *

In sum, the evidence that the court below held sufficient to justify the imposition of compensatory and punitive damages showed at most only that the union had mistakenly appraised the conflicting medical information it received. Assuming that the union was mistaken, such a mistake cannot by itself support an inference that the union acted in bad faith. If such an inference were permissible, virtually no scope would be left for the exercise of the discretion which this Court has recognized "must be allowed a statutory bargaining representative," and its "wide range of reasonableness" would be dramatically curtailed. *Ford Motor Co.* v. *Huffman*, 345 U.S. at 338. Indeed, in order to protect itself from the imposition of substantial liability in such cases, unions might feel impelled to carry to arbitration all grievances that employees request them to press, without regard to the merits thereof. Such a judicially induced abdication of union responsibility would imperil the effectiveness of the grievance procedure. That procedure is now widely relied on to achieve the prompt resolution of countless disputes which, when separately considered and expeditiously disposed of, are for the most part quite minor but which, when aggregated,

can become a potent source of discontent and unrest. Moreover, such curtailment of union discretion involves, *pro tanto*, a substitution of the court's judgment for that of the union with respect to the whole gamut of difficult questions, the resolution of which has heretofore been left largely to the processes of negotiation.

The preservation of an appropriate area for union discretion would seem to require that, in the absence of affirmative evidence either of hostile motive or "fraud, deceitful action or dishonest conduct" (*Humphrey* v. *Moore*, 375 U.S. at 348), liability for violation of a union's duty of fair representation may not be imposed unless there is no reasonable basis for the union's action. "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents * * *" (*id.* at 349). Since there was substantial evidence here that Owens was seriously ill, that test requires reversal of the judgment below.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted.

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National Labor Relations Board.

OCTOBER 1966.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to pre-

scribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder * * *

* * * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

APPENDIX B

NATIONAL LABOR RELATIONS BOARD,
SEVENTEENTH REGION,
Kansas City, Mo., September 16, 1960.

Re: Your File No. 18760
Owens vs. *Swift & Company*

Allan R. Browne, Esq.
Ennis, Browne and Martin
Kansas City 6, Missouri

Dear Mr. Browne: This agency administers the Labor Management Relations Act of 1947, as amended, by the Labor-Management Disclosure Act. The fact that an employee has been terminated from his employment may be a violation of the laws we administer, if it can be shown that the employer discriminated against this employee in regard to hire or tenure of employment, to encourage or discourage membership in any labor organization. This would be a violation of Section 8(a)(3).

In addition, if it can be shown that a labor organization caused, or attempted to cause, an employer to discriminate against an employee in violation of Section 8(a)(3) for some reason other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation of Section 8(b)(2) of the Act.

If there is some evidence present that this man was terminated for the reasons above, he should file a charge in this office and submit evidence of the alleged discrimination.

There is presently no special National Labor Relations Board bar. As a representative of Benjamin Owens, you are entitled to practice before the Board.

I am enclosing a copy of the Rules and Regulations and Statements of Procedure, which will give you a more comprehensive picture of the law and what is considered a violation under it.

Yours very truly,

s/ Jack I. Orlove
JACK I. ORLOVE, *Attorney*

Enclosure

U.S. GOVERNMENT PRINTING OFFICE: 1966